No. 16-1498

IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN INC., A YAKAMA NATION CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF OF *AMICI CURIAE* THE WASHINGTON OIL MARKETERS ASSOCIATION AND WASHINGTON ASSOCIATION OF NEIGHBORHOOD STORES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

A. INTRODUCTION 1

B. INTEREST OF *AMICI CURIAE* 1

C. SUMMARY OF ARGUMENT 2

D. ARGUMENT 3

(1) Washington Fuel Taxes 3

(2) Neither Treaty Language Nor Federal Precedent Interpreting Travel Rights in Indian Treaties Creates a Right to Trade for Tribal Members 10

(3) This Court's Precedents on Taxation of Tribal Activity Off-Reservation Permit the Imposition of the Tax on Cougar Den 13

(4) The Washington Court's Treaty Interpretation Will Have a Major Impact on State Transportation Revenues and an Anti-Competitive Impact on Other Fuel Retailers 15

Table of Contents

Page

(a) Effect on Washington State Transportation Budget.....15

(b) Effect on Cougar Den's Nontribal Washington State Competitors.....19

E. CONCLUSION.....22

TABLE OF CITED AUTHORITIES

Page

CASES

Automobile Club of Washington v. City of Seattle, 346 P.2d 695 (Wash. 1959) 17

Automotive United Trades Org. v. State, 357 P.3d 615 (Wash. 2015) 9

Chocktaw Nation of Indians v. U.S., 318 U.S. 423 (1943) 11

Cougar Den, Inc. v. Wash. State Dep't of Licensing, 392 P.3d 1014 (Wash. 2017) 11

Cree v. Flores, 157 F.3d 762 (9th Cir. 1998) 12

Cree v. Waterbury, 78 F.3d 1400 (9th Cir. 1996) 12

King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), *rev'd*, 843 F.3d 810 (9th Cir. 2016) 22

King Mountain Tobacco Co., Inc. v. McKenna, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015) 11, 12, 22

Cited Authorities

Page

Matheson v. Wash. State Liquor Control Bd.,
130 P.3d 897 (Wash. App.), *review denied*,
158 Wn.2d 1023 (Wash. 2006) 22

McClanahan v. State Tax Comm'n of Ariz.,
411 U.S. 164 (1973) 4

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973) 4, 13

Nw. Bands of Shoshone Indians v. U.S.,
324 U.S. 335 (1945) 11

Oklahoma Tax Comm'n v. Chickasaw Nation,
515 U.S. 450 (1995) 4, 5, 7, 9

Ramsey v. U.S.,
302 F.3d 1074 (9th Cir. 2002) 12

Rogers v. Lane County,
771 P.2d 254 (Or. 1989) 15

Squaxin Island Tribe v. Stephens,
400 F. Supp. 2d 1250 (W.D. Wash. 2005) 3, 4, 7, 8

State ex rel. Bugge v. Martin,
232 P.2d 833 (Wash. 1951) 17

State ex rel. Heavey v. Murphy,
982 P.2d 611 (Wash. 1999) 18

Cited Authorities

Page

State ex rel. O'Connell v. Slavin,
452 P.2d 943 (Wash. 1969).....17

U.S. v. King Mountain Tobacco Co., Inc.,
2015 WL 4523642 (E.D. Wash. 2015).....13, 22

U.S. v. Wilbur,
674 F.3d 1160 (9th Cir. 2012).....13

United States v. Fiander,
547 F.3d 1036 (9th Cir. 2008) 13

United States v. Smiskin,
487 F.3d 1260 (9th Cir. 2007).....12

Wagnon v. Prairie Band Potawatomi Nation,
546 U.S. 95 (2005) 5, 8

Washington State Highway Commission v. Pacific Northwest Bell Telephone Co.,
367 P.2d 605 (Wash. 1961).....17

Washington v. Confederated Tribes of Colville Indian Reservation,
447 U.S. 134 (1980).....13, 14

Yakama Nation v. Gregoire,
680 F. Supp. 2d 1258 (E.D. Wash. 2010), *aff'd*,
658 F.3d 1078 (9th Cir. 2011).....22

Page

STATUTES AND OTHER AUTHORITIES

RCW 46.68.070 16

RCW 82.36.010(12) 3, 8

RCW 82.36.010(13) 3

RCW 82.36.010(16) 13

RCW 82.36.010(17) 3

RCW 82.36.020 7

RCW 82.36.020(1) 8

RCW 82.36.020(2) 9, 13

RCW 82.36.026 9

RCW 82.36.026(5) 8

RCW 82.36.407(1) 7

RCW 82.38.020(26) 13

RCW 82.38.030(1) 8

RCW 82.38.030(7) 9, 13

Cited Authorities

Page

Sup. Ct. R. 37(3)(a) 1

Sup. Ct. R. 37(6) 1

Wash. Const. art. II, § 40 ..... 15, 16

Wash. Laws of 1983, 1st Ex. Sess., ch. 49, § 26 5

Wash. Laws of 1995, ch. 320, § 2 6

Wash. Laws of 1995, ch. 320, § 3 6

Wash. Laws of 1998, ch. 176, § 1(3) 7

Wash. Laws of 1998, ch. 176, § 7 5

Wash. Laws of 1998, ch. 176, § 48(1) 7

Wash. Laws of 1998, ch. 176, § 48(2) 7

Wash. Laws of 1998, ch. 176, § 81 7

Wash. Laws of 2013, ch. 3 22

Wash. Laws of 2013, ch. 225 9

Wash. Laws of 2015, ch. 228, § 40 9

Wash. Laws of 2017, Ch. 313 16

Cited Authorities

Page

Wash. Laws of 2018, Ch. 297 16

Yakama Treaty, art. III, 12 Stat. 951 (1855) 2, 3, 12

Melinda Smith, ***Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?***, 39 Am. Indian L. Rev. 507 (2014/15) 22

A. INTRODUCTION

This brief is submitted on behalf of the Washington Oil Marketers Association ("WOMA") and the Washington Association of Neighborhood Stores ("WANS") in support of Washington State's position seeking reversal of the decision of the Washington Supreme Court. This brief is filed with the consent of all parties pursuant to Rule 37(3)(a).[1]

B. INTEREST OF *AMICI CURIAE*

WOMA is a nonprofit trade association with individual and corporate members that market petroleum products in Washington State and associate members that sell products and services that support the petroleum industry. WOMA members account for nearly 80% of all petroleum products sold in Washington State, including 68,000,000 gallons of heating oil to residential and industrial users.

WOMA is closely aligned with two regional trade associations: The Pacific Oil Conference and the Western Petroleum Marketers Association. WOMA is also a member of the national Petroleum Marketers Associations of America, which represents petroleum marketers on national issues in Washington D.C.

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1. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authorized this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing.

WOMA is the only association in Washington State that focuses on all aspects of the petroleum marketing industry and monitors legislative and regulatory issues involving fuel, energy, alcohol, tobacco, transportation, the environment, and the state budget and taxes. WOMA also lobbies on behalf of petroleum marketers and oil heat dealers with state government agencies and the legislature in Olympia, and stays engaged with the state and national associations referenced above.

WANS is a business organization that provides information and assistance to Washington State's convenience store industry on a wide variety of topics including legal, legislative, and regulatory issues to enable that industry to remain competitive in the marketplace.

C. SUMMARY OF ARGUMENT

The legal incidence of Washington State's fuel tax occurs off the Native American reservations in that state. It applies to fuel suppliers such as Cougar Den.

Article III of the United States treaty with the Yakama Nation states in pertinent part:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Yakama Treaty, art. III, 12 Stat. 951 (1855). While the treaty gives Yakama tribal members a right to travel without fees on public highways, the specific language of the treaty does not confer upon those tribal members a "right to trade" or a right to evade legitimate state fuel taxation. In suggesting to the contrary, the Washington Supreme Court opinion contravenes Ninth Circuit precedent interpreting the same treaty language and long-standing principles of this Court in interpreting Native American treaties.

Further, the Washington court's interpretation will effectively confer tax-exempt status on tribal fuel businesses, fundamentally damaging Washington's fuel tax revenues that are constitutionally dedicated to transportation purposes. That interpretation will create severe competitive disadvantages for businesses like the amici's members. The opinion's analysis cannot simply be confined to fuel taxes; it will also affect numerous other areas of state taxation.

D. ARGUMENT

(1) Washington Fuel Taxes

Initially, critical to this Court's decision is a clear understanding of the nature of Washington's fuel tax and its legal incidence as to entities like Cougar Den. *See also,* petitioner br. at 6-8. The motor vehicle fuel market in Washington often involves a four-tiered distribution chain. *Squaxin Island Tribe v. Stephens,* 400 F. Supp. 2d 1250, 1252 (W.D. Wash. 2005); *see, e.g.,* RCW 82.36.010(12), (13), (17). Suppliers, also called licensees, are the refineries, producers, or importers that produce,

blend or import fuel in Washington. *Squaxin*, 400 F. Supp. 2d at 1252. Distributors transport fuel between suppliers and retailers. *Id.* Retailers sell fuel to consumers. *Id.* Consumers purchase fuel from the retailers for use in their vehicles. *Id.*

Suppliers refine fuel or bring fuel into Washington State by pipeline, cargo vessel, and ground transportation. *Squaxin*, 400 F. Supp. 2d at 1252. Distributors transport the fuel between suppliers, usually by purchasing fuel from suppliers at a "terminal rack," which is the platform or bay at which motor vehicle fuel from a refinery or terminal is delivered into trucks, trailers, or rail cars. *Id.*

A State cannot impose a tax on tribal activities occurring within a reservation. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165-66, 171-73 (1973) (invalidating state income tax imposed on tribal member's income earned on reservation); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 455 (1995) (noting the critical importance of the legal incidence of the tax, this Court held that a state could not impose fuel taxes on fuel sold by the tribe on the reservation, but it may tax all persons, including Native Americans, residing off-reservation). Activities outside the reservation are subject to a state's general tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146-49 (1973) (upholding state gross receipts tax imposed on tribe's ski resort operated off-reservation). The tax at issue here is subject to the latter principle. Under these authorities, a fuel tax collected from suppliers or distributors operating off-reservation that is not required to be passed down the distribution chain, as here, is a lawful tax. A tribe and its members are not immune from the economic burden of such a tax,

as this Court has recognized in upholding state fuel tax because legal incidence fell on distributors operating off-reservation. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). In cases assessing whether a tribe is immune from state taxation, this Court clarified that the "legal incidence" of a tax – where and upon whom the tax is being imposed – is often the determining factor. *Id.* at 101, *citing Oklahoma Tax Comm'n*, 515 U.S. at 458-60, 462-64.[2]

As the case law on tribal immunity and fuel taxation evolved, the Washington Legislature shifted the incidence of Washington's fuel tax. In 1994, the fuel tax was collected from distributors, who were *required* to pass the tax down the distribution chain, rather than having the option to do so. Wash. Laws of 1983, 1st Ex. Sess., ch. 49, § 26; *see also*, Wash. Laws of 1998, ch. 176, § 7. The Colville and Yakama tribes sued the State, arguing that the fuel tax was being imposed unlawfully on sales to tribal members on reservation land because the law required the tax to be passed forward and thus the real incidence of the tax fell on tribal retailers on the reservation. These lawsuits resulted in consent decrees between the State and the two

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2. The concept of tax incidence is critical to understanding the present case because the legal incidence of a tax determines whether there is a valid claim for preemption or immunity. If a tax is imposed on a distributor and is *voluntarily* passed through the chain of distribution as part of the cost of doing business, the incidence of the tax falls on the distributor, and not on any of those subsequent purchasers such as retailers or consumers. *Wagnon*, 546 U.S. at 103. Thus, those subsequent retailers and consumers are not entitled to exemption from those taxes simply because they are doing their business on tribal land, because the tax is not imposed for activities taking place on tribal land. *Id.*

tribes under which the tribes agreed to track fuel sales to members versus nontribal members. In the consent decrees, the State agreed to repay the tribes the amount of fuel taxes paid on fuel purchased by tribal members from on-reservation retailers.[3] The tribes would tell the State the number of gallons of fuel sold to tribal members, and the State would calculate the tax refund based on the total number of gallons. *Id.* Pursuant to legislative direction, Wash. Laws of 1995, ch. 320, §§ 2, 3, the State entered into agreements with other tribes on a basis akin to the consent decrees.[4]

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3. The Yakamas, one of the tribes referenced above, refused to remit to Washington State the fuel taxes they collected. News accounts indicated that the amount withheld was as much as $25 million. http://seattletimes.com/State-Yakama-Nation-agree-on-simpler-fuel-tax-system. The State sued the Yakamas to recover the past due taxes. The State settled with the Yakamas for $9 million. Simultaneously, the State entered into an agreement with the Yakamas in which the State collects the fuel tax and remits 75% of the collections to the tribe. The Yakamas agreed to pay the State $9 million but that sum will be paid from the tax revenue the Yakamas will receive from Washington State. https://www.seattletimes.com/seattle-news/state-yakama-nation-agree-on-simpler-fuel-tax-system.

4. Shortly after the 1995 fuel tax amendments, the State abandoned the "counting gallons" approach because it required substantial record-keeping requirements and imposed an administrative burden on the tribes, and instead entered into agreements based upon a formula. Under these agreements, the State agreed to disburse fuel tax revenues to the tribes based on the number of enrolled local tribal members, multiplied by the average per capita consumption of fuel statewide, disbursing to the tribes 100% of the fuel tax revenue applicable to this amount of fuel. The State entered into such agreements with numerous tribes.

In 1999, the Washington Legislature changed the point of collection for the fuel tax from distributors to suppliers in order to increase administrative efficiency and to provide greater revenues for the State. Wash. Laws of 1998, ch. 176, § 1(3). With respect to the legal incidence of the tax, however, the law still required that the tax to be passed down the distribution chain to retailers and consumers, instead of simply allowing the suppliers to choose whether to pass on the tax. *See, e.g., id.*, §§ 48(1), 81. The Legislature made no changes to the existing tribal agreements, and the authorization to enter into such agreements remained in place. *See id.*, §§ 48(2), 81.

In the early 2000s, the Squaxin and Swinomish tribes sued the State arguing that the tribes were completely immune from Washington's fuel tax, not just for sales of fuel to tribal members but for sales to *all* fuel purchasers on tribal land. They asserted that under the then-existing law,[5] the legal obligation to pay the tax fell on the retail tier of the distribution chain, including tribal retailers. *Squaxin*, 400 F. Supp. 2d at 1251. The tribes argued that because there was no consumer-level enforcement mechanism, and because retailers were not entitled to refunds if consumers failed to pay the tax, the legal incidence of the tax fell on retailers. *Id.* at 1255-57.

Relying on *Chickasaw*, a case in which the legal incidence of a state fuel tax also fell on tribal retailers, the district court in *Squaxin* enjoined the State from collecting fuel taxes on "the Tribes' retail sales of fuel

5. *See* former RCW 82.36.020. However, the law also stated that the ultimate incidence of the tax was intended to fall on consumers. *See* former RCW 82.36.407(1).

products on Tribal land." *Id.* at 1262.[6] Because the State was not permitted to tax tribes for transactions on tribal land, the court concluded that Washington fuel taxes, the legal incidence of which fell on tribal retailers, were illegal. *Id.*

In December 2006, this Court issued its decision in *Wagnon*, upholding Kansas' fuel tax because the tax was explicitly imposed on off-reservation sales to distributors and did not require those distributors to pass the tax forward in the distribution chain. *Wagnon*, 546 U.S. at 103. Because the legal incidence of the tax fell off-reservation, the tribes were not immune from the tax simply because it was included by distributors in the price of the fuel they sold on-reservation. *Id.*

In 2007, to remedy the issues raised in the *Squaxin* ruling, Washington shifted the full burden of its fuel tax to suppliers. RCW 82.36.020(1); RCW 82.38.030(1). Under this statute, the legal incidence of Washington's fuel tax now falls expressly on suppliers and is imposed on the first taxable event in Washington. *See* RCW 82.36.010(12), .020(1), .026(5); RCW 82.38.030(1), (7), .035(6). *None* of the activities constituting the first taxable event – removing fuel from a refinery, removing fuel from the terminal rack, importing fuel from another state, or blending fuel – is

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6. In reaching its ruling, the *Squaxin* court noted that Washington's fuel tax (at that time) was legally required to be passed down the distribution chain to retailers. *See Squaxin*, 400 F. Supp. 2d at 1252-53. Suppliers and distributors would "simply collect and remit the funds" and would be "reimbursed for any deficiency." *Id.* at 1252. In contrast, retailers were not legally required to pass the fuel tax on to consumers, and were not entitled to a refund if a consumer failed to pay the tax. *Id.* at 1252-53.

conducted on any tribal lands. There is no requirement that the cost of the tax be passed down, but, as with the Kansas tax this Court considered in *Wagnon*, suppliers are permitted to include "as a part of the selling price an amount equal to the tax." RCW 82.36.026.[7]

This 2007 change in Washington law shifted Washington's fuel tax regime from one similar to Oklahoma's in *Chickasaw*, where the legal incidence fell on tribal retailers, to one like Kansas' regime in *Wagnon*, where the legal incidence fell on entities like Cougar Den and other suppliers and importers located off tribal lands.[8]

The Washington Legislature authorized the State to enter into compacts with tribes in that state usually refunding 25% of fuel taxes collected to the tribes to ameliorate any lingering adverse effect of Washington's fuel tax system on those tribes. Such fuel compacts were upheld by Washington's Supreme Court. *Automotive United Trades Org. v. State*, 357 P.3d 615 (Wash. 2015).

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7. The fuel tax is imposed at the first of the following transactions: (1) when fuel is removed from the terminal rack by a supplier and sold to a distributor; (2) when fuel is produced; (3) imported; or (4) blended in the State. RCW 82.36.020(2); *see also*, RCW 82.38.030(7). While the fuel tax is included in the price of fuel sold and delivered to tribal fuel retailers, the legal incidence of the tax is placed on suppliers (who are non-Indian) and the taxable event arises off reservation.

8. Washington consolidated its treatment of gasoline and diesel fuels into a single code chapter. Wash. Laws of 2013, ch. 225; Wash. Laws of 2015, ch. 228, § 40. That statutory change, effective in 2016, does not apply to the events in this case.

Cougar Den is subject to Washington's fuel tax in the same way as any other fuel supplier, or as any importer or distributor that buys fuel in another state and brings it into Washington is subject to taxation. The legal incidence of Washington's fuel tax as to Cougar Den unambiguously occurs off-reservation.[9]

(2) Neither Treaty Language Nor Federal Precedent Interpreting Travel Rights in Indian Treaties Creates a Right to Trade for Tribal Members

The Washington Supreme Court misconstrued the plain language of the Yakama treaty to find a "right

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9. At the time this litigation began, Cougar Den was a private wholesale fuel company owned by Richard "Kip" Ramsey, a Yakama tribal member. It never applied for or held any type of fuel license from Washington State in order to acquire gasoline or diesel fuel wholesale, although it obtained an Oregon fuel dealer's license in 2012, using that license to purchase gasoline and diesel wholesale in Oregon. It avoids Oregon fuel taxes because it exports that fuel. ORS 319.240. *See* petitioner br. at 9-10.

In March 2013, Cougar Den began exporting fuel from Oregon into Washington. It contracted with a trucking company, KAG West, to pick up its fuel in Oregon and transport it into Washington. Cougar Den then imported millions of gallons of fuel in 2013 without paying Washington taxes.

Cougar Den provided more than 90 percent of its fuel to two gas stations called Wolf Den and Kiles Korner in Wapato, Washington. Wolf Den and Kiles Korner sell retail fuel to the general public. Cougar Den provided the remainder of the fuel to businesses owned by Ramsey in White Swan, Washington. Before April 2013, those retailers purchased fuel from Washington-licensed fuel suppliers who paid Washington fuel taxes.

to trade" that was *nowhere* to be found in the treaty language. *See, e.g., Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 392 P.3d 1014, 1019 (Wash. 2017) ("We hold that the right to travel provision in the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce."). This construction contravenes this Court's long-standing emphasis in *Chocktaw Nation of Indians v. U.S.*, 318 U.S. 423, 432 (1943); *Nw. Bands of Shoshone Indians v. U.S.*, 324 U.S. 335, 353 (1945) on the enforcement of plain treaty language as written. The petitioner's brief at 21-39 is entirely correct in arguing that the treaty language does not support the Washington court's construction.

Amici are concerned not only because the Washington court's opinion is inconsistent with controlling case law, but, as shown in section (4), that legal error directly harms the *amici* who must compete with fuel businesses that can, through a Yakama distributor, deal in fuel with the extraordinary competitive advantage of avoiding Washington State's fuel taxes.

For example, this Court's case law was properly applied by the Ninth Circuit, rejecting such a right in interpreting the *same provision* of the *identical treaty* in *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015).[10]

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10. Apart from a different product being at issue, the facts in *King Mountain* and this case are essentially identical. King Mountain Tobacco Co. was owned by an enrolled Yakama tribal member. It initially bought tobacco in North Carolina and processed it there. It then brought the processed product back to Washington State where it was then sold on the reservation and throughout the state and 16 others. King Mountain asserted it

In addressing article III of the treaty, the Ninth Circuit stated: "As shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *Id.* at 996. That court further concluded "the Treaty is not an express federal law that exempts King Mountain from state economic regulations" and "there is no right to trade in the Yakama Treaty." *Id.* at 997, 998."

The Washington court also misread the Ninth Circuit opinion in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). *Smiskin* does not aid Cougar Den's position. In *Smiskin*, a criminal prosecution for trafficking in illegal cigarettes, the Ninth Circuit held that a pre-transport notice requirement for moving cigarettes was a condition on travel that was inconsistent with article III of the Yakama treaty, 487 F.3d at 1264-66, relying on its earlier rulings in the *Cree* cases that the treaty preempted state truck license fees. No such travel-related fee is at issue here. Moreover, the *Smiskin* court *nowhere* recognized a broad-based right to travel as did the Washington court.

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was exempt from a Washington State health-related assessment pursuant to a Master Settlement Agreement between the states and tobacco manufacturers, or, alternatively, a tax in lieu of that assessment. 768 F.3d at 991-92.

11. The *King Mountain* court's analysis flowed from a number of prior Ninth Circuit decisions analyzing the very same provision of the very same treaty. *See Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996) (trucking license fees were subject to Yakama treaty); *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (truck license and overweight fees subject to Yakama treaty); *Ramsey v. U.S.*, 302 F.3d 1074, 1080 (9th Cir. 2002) (upholding federal diesel fuel tax from Yakama treaty challenge).

See also, United States v. Fiander, 547 F.3d 1036 (9th Cir. 2008); *U.S. v. Wilbur*, 674 F.3d 1160, 1180-81 (9th Cir. 2012) (rejecting broad right to trade in Swinomish treaty).

Simply put, there is no right to trade in the treaty at issue. The applicable treaty provided that Yakama tribal members had the right to travel on public highways like any other citizens, free of specific fees for such rights; no such fee was imposed here.[12]

(3) This Court's Precedents on Taxation of Tribal Activity Off-Reservation Permit the Imposition of the Tax on Cougar Den

As noted in the petitioner's brief at 18-21, a cardinal principle of this Court's Native American treaty jurisprudence that tribal members acting outside of the reservation are subject to the very same taxation obligations as are nontribal citizens of a state. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe, supra* at 148-49. Again, the *very same treaty* has been interpreted by this Court to support this analysis. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), this Court also rejected the notion

12. As noted *supra*, Washington imposes a tax on wholesale fuel when it enters the state or is removed from a bulk facility in the state, and the person taxes is the fuel owner. RCW 82.36.010(16), 82.38.020(26), 82.36.020(2), and 82.38.030(7). The agency's final order specifically found that the tax is "not a charge for Cougar Den's use of public highways. ... Cougar Den is being taxed for importing fuel." Final Order CL 20.

that a Yakama tribal concern could sell cigarettes free of Washington State taxation, stating that a "State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation." *Id.* at 151.[13]

It is no different here. The treaty at issue merely secured for Yakama tribal members a right to "travel upon all public highways" in common with all other citizens of the United States. It did not forestall application of a nondiscriminatory state tax law applicable to all Washington citizens off-reservation. This is particularly true where the incidence of the tax on Cougar Den is plainly off-reservation.

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13. In *Colville*, federally licensed Native American traders engaged in on-reservation sales, predominantly to nontribal members, of cigarettes supplied by several Washington tribes. The tribes imposed a tax largely on cigarette purchasers. Washington State also imposed a tax on cigarette purchasers. The low sale price of untaxed cigarettes was the only reason purchasers journeyed to the reservation. If the Washington tax were collected, on-reservation cigarette purchases by nontribal members would end. The tribes argued that while both the tribe and Washington State had an interest in taxing to raise revenue, federal law supporting tribal self-determination and economic development preempted the State's interest. This Court rejected both arguments.

This Court held that the State could tax cigarette sales by a tribe to non-Indians and nonmember Indians even though sales to tribal members were not taxable by the State and the tribe imposed its own tax. *Id.* at 155-56, 160-61. The state taxes were not preempted by federal law and did not interfere with tribal self-government. *Id.* at 155-56. The State could legitimately seize cigarettes off-reservation that failed to meet Washington State taxation requirements. *Id.* at 161-62.

(4) The Washington Court's Treaty Interpretation Will Have a Major Impact on State Transportation Revenues and an Anti-Competitive Impact on Other Fuel Retailers

A construction of the Yakama Treaty recognizing a "right to trade" that forestalls imposition of a non-discriminatory fuel tax whose legal incidence is off-reservation will have a profound impact on a variety of state taxes. The Washington court's treaty construction and Cougar Den's position will provide a huge competitive advantage to tribal businesses over nontribal competitors who would not enjoy the same tax exempt status claimed by such tribal businesses. While petitioner has explained how this Yakama argument leads to tax avoidance from coast to coast, *amici* explain *infra* how that tax immunity will impose significant harm on competing nontribal businesses.

(a) Effect on Washington State Transportation Budget

In 1944, responding to concern that gasoline excise tax revenues were being diverted from street and highway improvement to non-highway uses, the citizens of Washington enacted article II, § 40 of the Washington Constitution.[14] This amendment provides that motor vehicle

14. The historical impetus to prevent diversion of gas tax revenue found its source in the terrible state of highway transportation systems in the 1930's. *Rogers v. Lane County*, 771 P.2d 254, 256-58 (Or. 1989). To remedy the problem, a number of states earmarked revenue from gasoline and motor vehicle-related taxes to be used exclusively for highway purposes. *Id.* at 540. Nevertheless, legislatures continued to divert the funds. Washington voters enacted the 18th Amendment to keep motor fuel taxes dedicated to their intended purpose.

license fees and excise taxes on the sale, distribution, or use of motor vehicle fuel must be used "exclusively for highway purposes." Wash. Const. art. II, § 40. To that end, such revenues are placed in a motor vehicle fund ("MVF") separate from the State's General Fund, RCW 46.68.070. The Washington Legislature appropriates from the MVF to sustain the State's biennial transportation budget that funds both transportation operational needs and capital projects. *See, e.g.*, Wash. Laws of 2017, Ch. 313; Wash. Laws of 2018, Ch. 297.

Article II, § 40 is very prescriptive as to what constitutes a "highway purpose." Funds from motor vehicle fuel excise taxes may only be spent on road-related purposes and no others.[15] As early as 1951, in

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15. Washington Constitution article II, § 40 states:

> All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:
>
> (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
>
> (b) The construction, reconstruction maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public

State ex rel. Bugge v. Martin, 232 P.2d 833 (Wash. 1951), the Washington Supreme Court held that the use of the MVF monies was confined to highway purposes. *See also, Automobile Club of Washington v. City of Seattle*, 346 P.2d 695 (Wash. 1959) (MVF could not be used to satisfy tort judgments); *Washington State Highway Commission v. Pacific Northwest Bell Telephone Co.*, 367 P.2d 605 (Wash. 1961) (cost of relocating utility facilities on rights-of-way not a highway purpose); *see also, State ex rel. O'Connell v. Slavin*, 452 P.2d 943 (Wash. 1969) (maintenance of a public transportation system not a highway purpose). Indeed, consistent with that interpretation, the Washington Attorney General has also formally opined that the 18th Amendment requires an excise tax on gasoline to be placed in the MVF. WA AGO 2001 No. 2.

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highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;

(c) The payment or refunding of any obligation of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;

(d) Refunds authorized by law for taxes paid on motor vehicle fuels;

(e) The cost of collection of any revenues described in this section:

Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

The policy underpinning the 18th Amendment is unambiguous: its framers wanted to ensure that that motor vehicle license fees and fuel taxes were used to construct and maintain highways, roads, and streets. *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 616 (Wash. 1999).

Cougar Den's activities impact Washington State fuel tax revenues, diminishing funds available for necessary transportation operations and capital projects at a time when Washington transportation needs are not being met due to lagging revenues.[16] In fact, Cougar Den's circumvention of Washington fuel taxes is estimated to have cost the MVF (and transportation projects in Washington State) nearly $45 million in transportation revenues between March 2013 and the present. It evaded payment of Washington State fuel taxes on 99 million gallons of fuel, representing $45 million in revenues lost to the State.

Moreover, Cougar Den has actually expanded its operations since the start of this action. It has rebuilt its Wapato, Washington location, adding six more gasoline dispensers. It has expanded its facility to accommodate more trucks by providing a new truck stop building, a new fuel canopy, and additional fuel tanks. Thus, Cougar Den itself will expand the volume of fuel dispensed off-reservation in Washington that evades Washington's fuel taxes.

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16. Washington policymakers have even considered a tax on the miles driven by vehicles as an alternative to excise taxes on fuel, as MVF revenues chronically lag behind transportation construction costs. https://www.seattletimes.com/seattle-news/transportation/washington-state-to-test-pay-by-the-mile-as-a-way-to-fund-highways/.

Additionally, if the Washington Supreme Court's opinion is affirmed, there is literally nothing to stop other tribally affiliated suppliers from emulating Cougar Den's action, entering the market and circumventing Washington fuel taxes. That construction will also cause harm in other states where taxes are imposed on fuel or other goods that enter into a state by roadway.[17]

The impact on Washington State transportation revenues, and those of other states, will be nothing short of catastrophic. *Amici* are concerned that as fuel tax revenues decline with this virtual tax immunity for Cougar Den and others similarly situated, Washington policymakers will seek to remedy such revenue losses by exotic tax schemes aimed at tax-paying businesses like *amici*.

(b) Effect on Cougar Den's Nontribal Washington State Competitors

News accounts of this case indicated that tribal fuel retailers (including Cougar Den itself) or retailers purchasing from Cougar Den enjoyed a 20 cent per

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17. The incentive for other tribal fuel importers and other wholesalers to enter this market is patent. This is not a theoretical concern. For example, First American Petroleum is engaging in similar conduct in California. http://www.firstamericanpetro.com/about-us/. The Nez Perce tribe has a similar treaty provision. 392 P.3d at 1024 n.11. Indeed, as the Washington court dissent noted: "A simple extension of the majority's logic would allow ***nontribal members*** to avoid the imposition of state use, excise, or sales tax on goods they consume through a contrived transport by Yakama Nation or Nez Perce tribal members." *Id.* (emphasis in original) (Fairhurst, J., dissenting).

gallon advantage over other retailers when Washington State's fuel tax was at 37.5 cents per gallon.[18] That tax rate increased since the time of the proceedings below to 49.4 cents per gallon, making the pump price disparity between retailers purchasing from entities paying the Washington tax and those purchasing from Cougar Den ever the greater, as recent news accounts documents.[19]

WOMA's members who purchase fuel in Oregon must obtain a fuel importer license, and pay Washington's fuel tax. Cougar Den, and any other similarly situated tribal fuel importer, do not. WOMA members are competitively disadvantaged; they simply cannot compete with a business like Cougar Den or its on-reservation retail customers, who sell the identical fuel as *amici*, but can do so while evading Washington State's fuel taxes.

Nontribal WOMA members have explained how this harm occurs and its effect on disadvantaged businesses. In testimony before the Washington State Senate Transportation Committee on Senate Bill 6193, Rod Smith, the vice president of RH Smith Distributing,

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18. http://www.yakimaherald.com/ news/ local/ gas- tax- fuels-debate- between-yakama-nation-state/article_8a9006b8-0116-11e5-b9b1-d75098f93ee7.html; http://www. yakimaherald.com/news/ business/local/does-state-gas-tax-apply-on-yakama-reservation-judge-will/ article_425f31a2-2ddf-11e5-9941-3fff12e36503.html; http://www.yakima herald.com/news/crime_and_courts/judge-s-ruling-expected-to-favor-treaty-rights-in-gas/ article_866c7922-30c8-11e5-b81c-d7d4d9013cea.html.

19. https://www.tri-cityherald.com/news/local/ article214070264.html (while gas prices in Washington were close to $3.43 per gallon, Cougar Den was selling gas at its White Swan, Washington outlet at $2.92 per gallon).

a family-owned fuel distribution company based in Washington State's Yakima Valley, and a WOMA member, provided this written testimony:

> Our company used to own a convenience store which sold fuel in Toppenish. Today it is closed and the fuel tanks are removed. We could not compete against the local Yakama tribal stations who today have a 45 cent per gallon buying advantage under our cost!! Customers will drive miles just to save a few pennies per gallon when shopping for fuel. How do businesses like ours, who are required to pay all the state taxes and fees, complete with a 45 cent per gallon disadvantage??

See www.tvw.org/watch/?clientID=9375922947&eventID=20160100 84& autostartstream=true. *See also,* http://lawfilesext.leg.wa.gov/biennium/ 2015-16/Pdf/Bill%20Reports/Senate/6193%20SBR%20TRAN%2016.pdf (official bill report).

Mr. Smith reports now that nontribal fuel outlets in Yakima and Yakima Valley cannot compete with Cougar Den given low posted retail fuel prices that draw in customers who shop for the lowest fuel price for their cars and trucks. The Yakama tribal-owned stations, all now supplied by Cougar Den and their fleet of trucks, always post the lowest prices in the area, according to Smith. Cougar Den leveraged its advantage and expanded into the fuel hauling business, owning its own trucks. The severity of the competitive disadvantage for retailers not purchasing fuel from Cougar Den is clear.

Similarly, WANS members are similarly disadvantaged in fuel sales. But the Washington Supreme Court's treaty interpretation will also impact other areas of commercial activities, particularly tobacco sales by WANS convenience store members. Should that court's treaty construction hold, tribal businesses will circumvent Washington State's high tobacco taxes, running afoul of contrary Ninth Circuit precedent.[20] The theory behind Cougar Den's activities may even extend into other unexpected commercial activities. *See, e.g.*, Melinda Smith, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 Am. Indian L. Rev. 507 (2014/15). Washington State legalized the recreational use of marijuana in 2012 by initiative. Wash. Laws of 2013, ch. 3.

E. CONCLUSION

The Washington Supreme Court's interpretation of the Yakama treaty that disregards its plain language should be reversed because it erroneously expands the applicable treaty language ensuring that tribal members can access transportation facilities into a "right to trade" found

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20. *E.g.*, *King Mountain*, 768 F.3d at 998 (state cigarette escrow payments); *U.S. v. King Mountain Tobacco Co., Inc.*, 2015 WL 4523642 (E.D. Wash. 2015) (federal tobacco assessments); *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), *rev'd*, 843 F.3d 810 (9th Cir. 2016); *Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258 (E.D. Wash. 2010), *aff'd*, 658 F.3d 1078 (9th Cir. 2011). *See also*, *Matheson v. Wash. State Liquor Control Bd.*, 130 P.3d 897 (Wash. App.), *review denied*, 158 Wn.2d 1023 (Wash. 2006) (upholding state cigarette excise tax on unlicensed Native American retailer selling cigarettes to other tribes).

nowhere in the treaty language. This misconstruction defeats the legitimate application of a nondiscriminatory state fuel tax whose incidence falls off reservation and will effectively blow gaping holes in the fuel tax revenues and transportation budgets of Washington and other states. It will allow tribal fuel suppliers an unfair advantage over nontribal business competitors. It will also create a precedent for tribal retailers of other products that this Court should not countenance.

This Court should reverse the decision of Washington's Supreme Court.

DATED this 15th day of August, 2018.

Respectfully submitted,

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